

NATIONAL WILDLIFE FEDERATION ET AL.

IBLA 80-370

Decided February 25, 1982

Appeal from determination by the Oregon State Office, Bureau of Land Management, endorsing sustained yield unit environmental impact statements as proper vehicles for evaluating Northern Spotted Owl management objectives.

Affirmed.

1. Environmental Policy Act -- Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

BLM's incorporation into its western Oregon forest management planning process, of Northern Spotted Owl conservation guidelines developed by a State-Federal interagency task force is not a major Federal action requiring a regional environmental impact statement where the spotted owls and the preservation of their habitat are significant considerations in existing sustained yield unit environmental impact statements.

APPEARANCES: Terence L. Thatcher, Esq., Eugene, Oregon, for appellants;  
Donald P. Lawton, Esq., Office of the Solicitor, Department of the Interior, Portland, Oregon, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

National Wildlife Federation, et al. 1/ have appealed an action by the Oregon State Director, Bureau of Land Management (BLM), promulgating certain

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1/ The other groups joining in the appeal are Land, Air and Water, Lane County Audubon Society; Oregon Wilderness Coalition; and Portland Audubon Society.

guidelines for management of the Northern spotted Owl (Strix occidentalis caurina) in western Oregon.  
2/

The instrument resulting in this appeal is a letter dated December 27, 1979, from the Oregon State Director to the Executive Director of the Oregon Wilderness Coalition. We quote the letter in full:

Dear Mr. Monteith:

Your recent letter expressed concern over application of the Oregon-Washington Wildlife Committee's Spotted Owl Management Plan.

The referenced guidelines have been promulgated by BLM in Oregon as planning guidelines, not as management direction. As such, they define one alternative that must be addressed in each BLM land use plan in western Oregon.

For example, the most recent planning effort, in our Coos Bay District, considered a number of alternative land use allocations, most of which provided more old-growth habitat than would implementation of the Spotted Owl Management Plan alone. The alternative proposed by the District Manager provides substantially more old-growth habitat than the Spotted Owl Management Plan does.

We are currently scoping an environmental impact statement on the 10-year timber management plan based on the cited Coos Bay District proposed land use plan. Public involvement in the scoping process has led us to recommend to our Washington Office that the EIS address several alternatives with provisions for different amounts of old-growth habitat, including an alternative that provides for such habitat primarily by compliance with the Spotted Owl Management Plan.

2/ Clearly, the "notice of appeal" in this case should have been treated as a protest pursuant to 43 CFR 4.450.2. That regulation provides that "any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." The regulation governing notices of appeal, 43 CFR 4.410, permits appeals only by "any party to a case who is adversely affected by the decision."

Herein, the Dec. 27, 1979, letter of the State Director can hardly be characterized as a "decision." It was merely an explanation that BLM had adopted the Spotted Owl Management Plan as "planning guidelines." The response to that letter should have been treated by the State office as a protest. On numerous occasions we have cited the distinction between an appeal and a protest and the reasons therefor. California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (9177); see Cascade Holistic Economic Consultants, 58 IBLA 332, 333 (1981); Elaine Mickels, 41 IBLA 305 (1979).

However, it would be an unreasonable administrative exercise in futility to remand this case to BLM for consideration of the "protest." See Cascade Holistic Economic Consultants, supra; Julie Adams, 45 IBLA 252 (1980).

We believe that only such geographically specific plans and environmental impact statements, with their ample public involvement provisions, can effectively evaluate the relevance of the guidelines in the Spotted Owl Management Plan in meeting the need to maintain the old-growth habitat component of the ecosystem in widely dispersed locations.

Sincerely yours,

State Director

Appellants contend that BLM's promulgation of the Spotted Owl Management Plan (SOMP) guidelines is a major Federal action significantly affecting the environment and as such requires the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1976). Appellants ask the Board to order BLM to prepare a programmatic EIS on the SOMP. Appellants also request that the Board order the suspension of all BLM timber sales in western Oregon pending development of an EIS.

According to the record, the spotted owl is not an endangered species. However, the SOMP was developed by the Oregon Endangered Species Task Force, a group chaired by a representative from the Oregon Wildlife Commission and, including members from Oregon State University, the United States Forest Service, the United States Fish and Wildlife Service, and BLM, in order to prevent the spotted owl from becoming an endangered species. The SOMP, as transmitted to both BLM and the United States Forest Service in 1977, is a three-page document stating as its objective: "To maintain a population of at least 400 breeding pairs of northern spotted owls distributed throughout the known range in Oregon."

The SOMP is an outline setting forth what actions should be undertaken in order to meet the objective. Its three major headings are: 1) Maintain habitat to support spotted owl population objective, 2) develop habitat management alternatives for the spotted owl, and 3) management program administration. Appendix A of the SOMP is entitled "Management Area Parameters." It sets forth salient data concerning spotted owl habitat, behavior, and distribution by agencies, as follows:

1. Size: A minimum of 1,200 contiguous acres per pair (i.e. one home range).

2. Description of Habitat: For each pair there should be a core area of at least 300 acres of old-growth forest maintained to benefit the spotted owl. If 300 acres of old-growth does not exist, then maintain all remaining old-growth and enough of the oldest contiguous or closely adjacent second growth to total 300 acres. The remainder of the habitat to be managed to provide at least 50% of the acreage in stands of 30+ year forests. Old-growth forest must be at least 200 years old and contain an average of 8-10 old-growth overstory trees (a minimum of four) per acre, with a developed understory greater than 30 years of age.

3. Number of Pairs: The management area should encompass the home ranges of a minimum of three pairs, with six pairs being ideal. Single pair enclaves are acceptable in peripheral situations, such as eastern Oregon, or where remnant habitat exists.

4. Proximity of Pairs: Core areas for each pair should be separated by approximately one mile, center to center.

5. Distribution Throughout Known Range:

a) As a goal management areas of 3 or more pairs should be 8 miles, not to exceed 12 miles apart. Single bird management areas should be 5 miles, not to exceed 8 miles, apart.

b) Distribution by agencies: BLM - 90 pairs  
   (suggested) USFS - 290 pairs  
   Other \* - 20 pairs

\* Others includes but not limited to Stat Lands (Forestry, Fish and Wildlife, and Parks) County lands, National Parks, and Private Forest lands.

By letter dated January 11, 1978, the State Director endorsed the SOMP stating: "[T]he BLM will continue to maintain and protect existing and newly identified spotted owl habitat \* \* \* until the final resource allocations are approved through the Bureau's Planning System." By memorandum dated March 11, 1979, to the district managers of western Oregon, the State Director, having reference to the Management Area Parameters quoted above, modified BLM's policy as follows:

"BLM district offices will manage spotted owl sites or habitat consistent with OR Inst. Memo No. 78-74 (BLM's 90-pair commitment) plus a minimum of an additional 30 percent as alternative sites to allow managers a wide range of options throughout the planning system. As a minimum, only the spotted owl sites meeting the parameters contained in the interagency plan will be carried forward through the planning system. Managers may elect to maintain additional habitat for experimental or study purposes. Sites not meeting the spotted owl management area parameters will be left to the land managers' discretion. Generally, only those non-selected sites where nests have been identified would continue to receive nesting season protection."

This policy is consistent with the recent clarification of the master Spotted Owl Management Plan and has the approval of the Interagency Wildlife Committee.

Our policy is in keeping with the original intent behind development of the Spotted Owl Management Plan which was to provide a self-sustaining population of spotted owls throughout Oregon. Those sites not required to meet the plan's objective can then be released for other management programs.

The reason for this policy modification, as explained in the memorandum, was to alleviate "stringent constraints on [BLM's] forest management activities."

In late 1979, the Executive Director of the Oregon Wilderness Coalition wrote the State Director asserting that the SOMP was "one of the most significant Federal actions yet proposed in the Pacific Northwest," and requesting to be notified of the anticipated date for release of the draft EIS. The State Director responded with his letter of December 27, 1979, and this appeal ensued.

As indicated previously, appellants contend that BLM's policies with respect to SOMP amount to a major Federal action requiring an EIS. Amplifying this argument, appellants assert that SOMP "proposes to maintain only 400 of an estimated 1,500-2,000 pairs of spotted owls (90 on BLM land)" and that SOMP contemplates the liquidation of old growth stands not supporting the 400 designated owl pairs, amounting to a 60-80% reduction in the population of an already threatened species (statement of reasons at 5). Appellants stress that under 40 CFR 1508.23 <sup>3/</sup> the SOMP is a proposal already implemented in that decisions have been made to save only a certain number of owls and to continue cutting old growth timber "in those areas not protected by the final plan" (statement of reasons at 13). Appellants are aware that impact statements have been and continue to be developed in conjunction with BLM's land use plans in the timber resource areas. They maintain that such local impact statements are not sufficient because they provide only a fragmented approach to owl management. They argue that a comprehensive interagency EIS is necessary (statement of reasons at 14). Appellants set forth a list of considerations to be addressed in such an EIS. They speculate that unless timber sales are suspended for spotted owl habitat areas pending completion of a comprehensive EIS, it may be impossible to maintain the minimum number set by the Oregon Endangered Species Task Force. In the last paragraph of their reply brief, appellants recognize the "economic significance of old growth for the timber industry in Oregon," and that the preservation of a stable timber economy is an interest that must be managed in harmony with the protection of spotted owl habitat.

[1] Under the terms of NEPA, an EIS is required to be included "in every recommendation or report on proposals for legislation and other Federal actions significantly affecting the quality of the human environment" 42 U.S.C. § 4332 (1976). The record herein demonstrates first, that BLM's

<sup>3/</sup> This regulation provides:

"§ 1508.23 Proposal.

"'Proposal' exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists."

policies on the spotted owl cannot properly be characterized as the type of action which by itself would trigger the requirement of an EIS under NEPA, and second, that the spotted owl has been and continues to be a significant consideration in the NEPA EIS's for western Oregon. In large measure, appellants' concerns are answered by NRDC, Inc. v. Kleppe, No. 75-7861 (D.D.C., filed Nov. 5, 1975), wherein BLM committed itself to the preparation of highly detailed EIS's covering each of the sustained yield units in Oregon. The Josephine Sustained Yield Unit EIS provides for the management of six pairs of owls. BLM points out in its answer (at 6) that 6,741 acres of timber land (including 873 acres of high intensity forest management lands) have been set aside for habitat, resulting in an annual reduction of timber harvest of 503,000 board feet. Similarly, the Jackson-Klamath Sustained Yield Unit EIS analyzes a proposal providing protection for eight pairs of owls and setting aside 2,176 acres for this purpose. The preparation plan for the South Coast and Curry Sustained Yield Units recommended the protection of 16 pairs of owls, <sup>4/</sup> or, in the alternative, 25 pairs, which was the number of owls inventoried in the district. In view of these data appellants are not accurate in their thesis that BLM's pre-EIS SOMP policies had fixed or finalized the size of the owl population to be managed.

Appellants' contention that the circumstances of this case require the preparation of a regional programmatic EIS directed chiefly to the spotted owl is not persuasive. The question of when a comprehensive EIS is required and what region it should cover was addressed in Kleppe v. Sierra Club, 427 U.S. 390 (1976) which involved coal operations, including the issuance of coal leases, approval of mining plans, and granting rights-of-way, among other things. An EIS had been prepared for coal operations plans in the Powder River Coal Basin, which was one small section in the Northern Great Plains region, an area including portions of Wyoming, Montana, North Dakota, and South Dakota (Kleppe, supra at 396-97). Addressing the question of the area to be covered by an EIS, the court stated at 412:

Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement on this entire region, and we agree. Tr. of Oral Arg. 67. The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Cf. SCRAP II, 422 U.S., at 325-326. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately. [Emphasis in original.]

This reasoning is applicable in the case before us. The spotted owl is only one individual species in a kaleidoscope of flora and fauna making up a forest. In addition there are watershed, recreational, and complex natural and

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<sup>4/</sup> According to BLM's answer, this EIS was scheduled for completion in December 1980.

economic resource considerations which must be addressed in managing the forests. All of these elements have been, and continue to be analyzed in the EIS's for each resource area, because the sustained yield EIS's were found to be administratively feasible and entirely commensurate with NEPA requirements. The type of EIS envisioned by appellants might run counter to NEPA and to the concerns appellants express, in that it would not provide comprehensive evaluations of all pertinent ecosystem interrelationships. Carrying appellants' logic one step further, an EIS emphasizing the spotted owl might well raise questions as to the necessity for EIS's on other individual species. Such fragmentation would not only be devoid of result orientation, but also administratively unmanageable.

There is no showing in the record before us that BLM's SOMP policies either circumvent NEPA, are detrimental to the spotted owl, or are contrary to the public interest in preserving the habitat of a species. On the contrary, BLM action appears to be consistent with the congressional intent as expressed in the realm of conservation. Section 2 of the Act of October 18, 1974, 16 U.S.C. § 670g (1976) requires the Secretary of the Interior to "develop, in consultation with the State agencies [responsible for the administration of fish and game laws], a comprehensive plan for conservation and rehabilitation programs" with regard to wildlife, fish, and game. 16 U.S.C. § 670h(a)(1) (1976). In addition, a state agency "may enter into a cooperative agreement" with the Secretary with respect to such a program. The agreement "shall \* \* \* provide adequate protection for fish and wildlife \* \* \* considered to be threatened, rare, or endangered by the State agency." 16 U.S.C. § 670h(c)(1)(A) and (c)(3)(D) (1976). 5/ BLM acted precisely within the parameters here expressed in accepting the SOMP guidelines and incorporating these guidelines in its forest resource management planning process. We conclude that the State Director's letter of December 27, 1979, correctly endorsed "geographically specific plans and environmental impact statements" as effective means for evaluating spotted owl management objectives. The requests to order BLM to prepare a regional EIS and to suspend timber sales are denied. 6/

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5/ Section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1976) requires all Federal agencies, in consultation with the Fish and Wildlife Service (FWS or Service), to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species, or adversely modify their critical habitats. The Service consults with Federal agencies and renders a biological opinion on the effects of agency action upon listed species, pursuant to section 7(b) 16 U.S.C. 1536(b) (1976). See Cumulative Impacts under section 7 of the Endangered Species Act, Solicitor's Opinion, 88 I.D. 907 (1981).

6/ Compare United States v. Kosanke Sand Corp., 12 IBLA 282, 80 I.D. 538 (1973), in which this Board held that granting a patent to mining claim was not a major Federal action requiring an EIS, and discussed cases in which an EIS had been required. See also James I. Thompson, 51 IBLA 154 (1980).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the determination appealed from is affirmed.

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Anne Poindexter Lewis  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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Bruce R. Harris  
Administrative Judge



